91-79

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DEBORAH S. BLUE AND RONALD M. BLUE,

Petitioners,

v.

GENESEE MEMORIAL HOSPITAL, INC.,

Respondent.

Petition For Writ Of Certiorari To The State Of Michigan Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Michigan Court of Appeals affirmed the trial court's grant of summary disposition to Defendant based on the Michigan Supreme Court's decision in *Hyde v. University of Michigan Regents*, 426 Mich. 233, 246, 393 N.W.2d 847 (1986), which states:

> Sovereign or governmental immunity from tort liability will be extended to a governmental agency operating a public general hospital or medical facility only in those cases involving a cause of action accruing prior to July 1, 1986, which was pending on January 22, 1985, or commenced on or after that date.

The questions presented are:

I. Does the classification created in *Hyde* among identical claimants, not based on when their causes of action accrued but rather on when they filed their suits, violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by creating an arbitrary and unreasonable classification that has no rational relationship to any legitimate governmental objective?

II. Does the retroactive rule announced by the Supreme Court of Michigan in *Hyde* violate Petitioners' right under the Fourteenth Amendment to due process of law by abolishing Petitioners' vested property right in a cause of action?

III. Does the retroactive application of the *Hyde* rule have any rational relationship to a legitimate governmental purpose as required by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution?

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statutes Involved 2

Statement of Case 3

Reasons for Granting Writ 7

I. THE CLASSIFICATION CREATED BY THE *HYDE* RULE AS APPLIED IN *BLUE V. GENESEE MEMORIAL HOSPITAL, INC.* VIOLATES PETITIONERS' RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT 10

A. *The classification created by the Hyde rule is arbitrary and unreasonable* 11

B. *The classification created by Hyde has no rational relationship to any legitimate governmental objective* 14

II. THE RETROACTIVE RULE ANNOUNCED BY THE MICHIGAN SUPREME COURT IN *HYDE V. UNIVERSITY OF MICHIGAN REGENTS* AS APPLIED IN *BLUE* VIOLATES PETITIONERS' RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT 17

A. *A cause of action in tort becomes a vested property right when it accrues* 18

B. *The retroactive rule created by Hyde has no rational relation to a legitimate governmental purpose, and thus violates the Due Process Clause of the Fourteenth Amendment* 22

TABLE OF CONTENTS – Continued

Page

Conclusion 24

Appendix A

Opinion of Court of Appeals of April 27, 1990 ..... 1a

Transcribed Opinion of The Circuit Court of Genesee County of January 19, 1988 ..... 4a

Judgment of February 4, 1988 ..... 6a

Order of Michigan Supreme Court of April 30, 1991 ..... 8a

Appendix B

Brief In Opposition To Defendant's Motion For Summary Disposition and Motion To Amend 10a

Appellants' Brief On Appeal 16a

Application For Leave To Appeal 24a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barr v. Preskitt, 389 F.Supp. 496 (E.D. Ala. 1975)..... 18

Barrows v. Jackson, 346 U.S. 249 (1953)..... 8

Carr v. Beech Aircraft Corp., 758 F.Supp. 1330 (D. Ariz. 1991).....13, 15

Coombes v. Getz, 285 U.S. 434 (1932).....18, 19

Edward v. Valdez, 789 F.2d 1477 (10th Cir. 1986) 10

Ettor v. City of Tacoma, 228 U.S. 148 (1913) ... 18, 19, 20

Greyhound Food Management, Inc. v. City of Dayton, 653 F.Supp. 1207 (S.D. Ohio 1986), *aff'd*, 852 F.2d 866 (6th Cir. 1988)..... *passim*

Haley v. Troy, 338 F.Supp. 794 (D. Mass. 1972)..... 11

Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) 19

Hartford Fire Insurance Co. v. Lawrence, Dykes, Goodenberger Bower & Clancy, 740 F.2d 1362 (6th Cir. 1984) 19

Jefferson Disposal Co., Inc. v. Parish of Jefferson, L. A., 603 F.Supp. 1125 (E.D. La. 1985) 19

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 12, 13, 14

Mathis v. Eli Lilly and Co., 719 F.2d 134 (6th Cir. 1983).....13, 19

Martinez v. California, 444 U.S. 277 (1980).....18, 22

New York Times Co. v. Sullivan, 376 U.S. 254 (1963) 8

TABLE OF AUTHORITIES – Continued

Page

Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984) 22

Pitts v. Unarco Industries, Inc., 712 F.2d 276 (7th Cir. 1983) 20

Reed v. Reed, 404 U.S. 71 (1971) 12

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 7

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 12

Schweiker v. Wilson, 450 U.S. 221 (1981) 14

Silver v. Silver, 280 U.S. 117 (1929) 22

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 22

MICHIGAN CASES

Campbell v. Detroit, 51 Mich. App. 34, 214 N.W.2d 337 (1973) 20

Cuisick v. Feldpausch, 259 Mich. 349, 243 N.W.2d 226 (1932) 20

Hyde v. University of Michigan Regents, 426 Mich. 233, 393 N.W.2d 847 (1986) ..... *passim*

Parker v. Highland Park, 407 Mich. 183, 273 N.W.2d 413 (1978) 3, 4, 5, 15, 20, 23

Ross v. Consumers Power, 420 Mich. 567, 363 N.W.2d 641 (1984) 4, 5, 15

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. Section 1257 ..... 1, 2

Supreme Court Rule 10 ..... 2, 8

MICHIGAN STATUTES

MCL 691.1401; MSA 3.996 (101) 2, 4

MCL 691.1407; MSA 3.996 (107) 3, 4, 5, 16, 17

OPINIONS BELOW

The opinion of the State of Michigan Court of Appeals is unreported and is printed in Appendix A to this petition, at page 1a. The transcribed opinion of the Circuit Court of Genesee County is printed in Appendix A, page 4a. The entry of judgment of the Circuit Court is printed in Appendix A, page 6a.

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 27, 1990. A timely application for leave to appeal to the Supreme Court of Michigan was denied on April 30, 1991. The jurisdiction of the Supreme Court is invoked under 28 U.S.C., Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

STATUTES INVOLVED

28 U.S.C. Section 1257 **State courts; certiorari**

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

SUPREME COURT RULE 10 **Considerations Governing Review on Writ of Certiorari**

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

MCL 691.1401

> (f) "Governmental function" is an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.

MCL 691.1407

> (4) This act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital or county medical care facility or to the agents or employees of such hospital or county medical care facility. As used in this subsection:
>
> > (a) "County medical care facility" means that term as defined in section 20104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20104 of the Michigan Compiled Laws.

STATEMENT OF CASE

The Petitioners, Mr. and Mrs. Ronald M. Blue, filed suit in the Circuit Court of Genesee County against Genesee Memorial Hospital, Inc., alleging that Mrs. Blue sustained serious injuries as a result of malpractice and/or negligent medical care. Mrs. Blue was admitted to Genesee Memorial Hospital on October 17, 1983 for a tonsillectomy. While under anesthesia, Mrs. Blue sustained serious injury to her left brachial plexus and left long thoracic nerve, resulting in impairment of the use of her left shoulder, arm, and hand.

At the time of Mrs. Blue's hospitalization, Genesee Memorial was owned and operated by the County of Genesee. In 1978 the Supreme Court of Michigan reexamined the common law rule which granted governmental immunity from tort liability to government agencies engaged in a governmental function. *Parker v. Highland Park*, 407 Mich. 183, 273 N.W.2d 413 (1978). The Supreme Court in *Parker* ruled that public hospitals were

not engaged in a governmental function and could be held liable for torts committed during day to day operations.

On October 18, 1983, the date of Mrs. Blue's injury and the date that her cause of action accrued, *Parker* was the law in Michigan; public hospitals were not immune from tort liability.

In 1984, the Supreme Court of Michigan again clarified the law regarding governmental immunity. *Ross v. Consumers Power*, 420 Mich. 567, 363 N.W.2d 641 (1984), held that all state and local government agencies:

> a. Are liable in tort for injuries arising out of the performance of a proprietary function, i.e., any activity conducted primarily for pecuniary profit, excluding activities normally supported by taxes and fees;
>
> b. Are immune from tort liability for injuries arising out of the exercise or discharge of a non-proprietary function, governmental function, i.e., any activity which is expressly or impliedly mandated or authorized by constitution, statute or other law.

The *Ross* Court, however, made no specific mention of public hospitals or *Parker*.

In response to the decision in *Ross*, the Michigan legislature enacted MCL 691.1401(f), which codified the definition of governmental function set forth in *Ross*, but created an exception for public hospitals, **which were not granted governmental immunity from tort liability**. MCL 691.1407(4) effective July 1, 1986.

In 1986, the Michigan Supreme Court in *Hyde v. University of Michigan Regents*, 426 Mich. 227, 393 N.W.2d

847 (1986), examined *Ross* in the context of three suits brought against public hospitals. The *Hyde* Court ruled that *Ross* had impliedly overruled *Parker*, thereby making public hospitals expressly authorized by statute, such as Genesee Memorial Hospital, immune from tort liability.

Faced with a conflict between its interpretation of *Ross* and MCL 691.1407(4), the *Hyde* Court created a retroactive law, ruling that governmental immunity from tort liability for operating a public hospital or medical facility, was limited to causes of action accruing prior to July 1, 1986, which were pending on January 22, 1985, or commenced on or after that date.

Petitioners' cause of action was filed in October, 1985. In February, 1987, Genesee Memorial Hospital asserted governmental immunity in a Motion for Summary Disposition. In response to Defendant's Motion, Petitioners raised a constitutional challenge to the retroactive rule in *Hyde*, claiming it violated Petitioners' right to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution, because it abridged a vested right and created an arbitrary and unreasonable classification that had no rational relation to any legitimate governmental objective. (See Plaintiffs' Brief In Opposition To Defendant's Motion For Summary Disposition and Motion To Amend, Appendix B, at page 10a)

The trial court rejected this constitutional challenge and granted Defendant's Motion for Summary Disposition based on the immunity defense, because Petitioners' claim accrued before July 1, 1986, and was filed after January 22, 1985, therefore falling within the limited period of governmental immunity created by *Hyde*. In ruling on the constitutional issues, the trial judge stated:

> [T]he Supreme Court had to know, when it made these rules, that cases would be affected – Plaintiffs' rights, I guess, would be affected and they make decisions there, and I agree, that based on the test of rational basis, they have made a decision and I don't think it's the position of the Circuit Courts to overrule, or try to read into *Ross* as applied through *Hyde*, anything more than has already been stated, and because of the application of those dates by the Supreme Court, at this time I'm not going to find that there's any violation of the plaintiff's equal protection or due process rights by the application now of *Ross* and *Hyde* to the Blue case. *Blue v. Genesee Memorial Hospital, Inc.*, No. 85-82334-NM, trans. op. at 41 (Jan. 19, 1988).

Petitioners appealed the trial court decision to the State of Michigan Court of Appeals, again raising constitutional challenges to *Hyde* (see Appellant's Brief On Appeal, Appendix B, at page 16a), but the lower court ruling was affirmed on April 27, 1990. The Court of Appeals stated:

> Even if we thought that this contention had some merit, we would be extremely reluctant to hold that a rule set forth by our Supreme Court is unconstitutional, given our posture as an inferior court. Presumably the *Hyde* Court, in devising a rule of retroactivity, thought through the constitutional repercussions of its decision, and a conclusion of constitutional validity can therefore be fairly implied from the holding itself. *Blue v. Genesee Memorial Hospital*, No. 106593, slip op. at 9 (Mich. Ct. App. 1990) (Appendix A, at page 1a).

However, a careful reading of *Hyde* shows that the Court did not consider the constitutionality of its decision to grant immunity retroactively. In fact, the majority

expressly declined to decide the plaintiffs' constitutional issues:

> Plaintiffs raise several equal protection and due process arguments. We did not decide these questions because they were not raised in or decided by, the lower courts. *Hyde v. University of Michigan Regents*, 426 Mich. at 244, n. 15.

The Petitioners again raised constitutional challenges to the Court of Appeals' reliance on *Hyde* in an application for leave to appeal to the Michigan Supreme Court, which was denied on April 30, 1991. (See Appellants' Application For Leave To Appeal, Appendix B, at page 24a)

REASONS FOR GRANTING THE WRIT

This case concerns the State of Michigan's violation of the Petitioners' and hundreds of other tort claimants' right to due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution:

> Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws. U.S. CONST. amend XIV, Section 1.

Only if a state deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment, can its protection be invoked. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 72 (1955). In *Blue* the State Court of Appeals applied law created by the Michigan Supreme Court, not the State legislature, which violated Petitioners' rights under the Fourteenth

Amendment. Actions by state courts do constitute the requisite state action under the Fourteenth Amendment. *Barrows v. Jackson*, 346 U.S. 249, 254 (1953). "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *New York Times Company v. Sullivan*, 376 U.S. 254, 265 (1963).

The Court of Appeals has, in fact, exercised power over the Petitioners by affirming the trial court's dismissal of their cause of action, based on the retroactive rule announced in *Hyde v. University of Michigan Regents*:

> Sovereign or governmental immunity from tort liability will be extended to a governmental agency operating a public general hospital or medical facility only in those cases involving a cause of action accruing prior to July 1, 1986, which was pending on January 22, 1985, or commenced on or after that date. *Hyde*, 426 Mich. at 246.

The Michigan Court of Appeals' decision in *Blue v. Genesee Memorial Hospital, Inc.* should be reviewed by this Court pursuant to Supreme Court Rule 10.1(c). The Court of Appeals decided an important federal due process question which has not been settled by this Court and also decided an important federal equal protection question in a way that conflicts with applicable decisions of this Court.

The State of Michigan Court of Appeals' application of the decision in *Hyde*, to the facts of this case and potentially to many other similarly situated tort claimants, deprives them of property without due process of law by abridging vested rights in causes of action that

accrued prior to any change in the law regarding governmental immunity.

Since there is some conflict among the United States Courts of Appeals over when a tort cause of action becomes a vested property right, the decision by the State of Michigan Court of Appeals, that Petitioners' due process rights were not violated, involves an important question of federal law which should be settled by this Court.

The Court of Appeals' application of *Hyde* in Petitioners' case also creates an arbitrary and unreasonable classification between tort claimants, which depends not on the date their causes of action accrued, but rather on the date they chose to initiate their suit.

The retroactive rule in *Hyde* creates two classes among identical tort claimants who received the same injury in the same hospital on the same day. One class will be able to seek compensation for their injuries, while the other class will suffer summary disposition based on a governmental immunity defense. There can be no rational basis for differentiating between these two classes.

By ruling on the constitutionality of *Hyde*, the State of Michigan Court of Appeals decided a federal question in a way that conflicts with applicable decisions of this Court involving equal protection, therefore, the decision should be reviewed.

I. THE CLASSIFICATION CREATED BY THE *HYDE* RULE AS APPLIED IN *BLUE V. GENESEE MEMORIAL HOSPITAL, INC.* VIOLATES PETITIONERS' RIGHT TO EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

The State of Michigan violated the Fourteenth Amendment by its application of the *Hyde* rule to Petitioners' case, denying Petitioners' equal protection of the laws. In determining whether a classification created by a State rule of law violates the Equal Protection Clause of the Fourteenth Amendment, first the Court must determine which standard of review is to be applied.

Since this case involves neither a suspect classification nor a fundamental right, the rational basis test is the appropriate standard of review. *Greyhound Food Management, Inc v. City of Dayton*, 653 F. Supp. 1207, 1213 (S.D. Ohio 1986), *aff'd*, 852 F.2d 866 (6th Cir. 1988). "The rational basis test requires the Court to identify the class created by the statute, and then to determine whether the classification is rationally related to a legitimate government interest. *Greyhound Food Management*, 653 F. Supp. at 1213 (quoting *Edward v. Valdez*, 789 F.2d 1477, 1483 (10th Cir. 1986)).

The rational basis test involves a three step analysis:

1) Identification of the classification created;

2) Identification of a legitimate state purpose; and

3) Determination of whether the classification created promotes a legitimate state interest.

Greyhound Food Management, 653 F. Supp. at 1214 (quoting *Edwards*, 789 F.2d at 1483).

In this case, the classification created by the *Hyde* rule differentiates between tort claimants depending on when they chose to file their cause of action and the speed at which it was adjudicated. If two claimants were injured on the same day in the same public hospital, one may have a viable cause of action and the other will not. The *Hyde* rule grants public hospitals immunity from tort liability on claims that accrued prior to July 1, 1986 and were pending on January 22, 1985 or commenced on or after that date. *Hyde*, 426 Mich. at 246.

This distinction between similarly situated claimants rests only on when they filed their claim and the speed of the court system in reaching a judgment. Those claimants who filed their suits and had a final decision reached before January 22, 1985, received an opportunity to seek compensation for their injuries, while those, like the Petitioners, who filed their suits within the statute of limitation period, but after January 22, 1985, were barred by retroactive governmental immunity.

A. The Classification Created by the *Hyde* Rule is Arbitrary and Unreasonable.

Classifications which serve as the basis for unreasonable and arbitrary discrimination between persons in meting out justice violate the Fourteenth Amendment. *Haley v. Troy*, 338 F. Supp. 794, 801 (D. Mass. 1972). A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated

alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

The classification created by the *Hyde* rule is arbitrary and unreasonable, because it differentiates between similarly situated claimants but has no relation to a legitimate state interest. The classification rewards claimants for filing quickly and for being fortunate enough to receive speedy adjudication on the merits in Michigan's congested court system, while it penalizes those who attempted to settle their cases at the claim stage and avoid the delays of litigation. The classification rests on nothing but luck and is capricious.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a similar classification to that in *Hyde* was created by an Illinois fair employment practices act. Although the language of the act did not expressly create a classification, the act had the affect of dividing claimants into two discrete groups that were accorded radically disparate treatment. *Logan*, 455 U.S. at 438:

> Claims processed within 120 days are given full consideration on the merits, and complainants bringing such charges are awarded the opportunity for full administrative and judicial review. In contrast, otherwise identical claims that do not receive a hearing within the statutory period are unceremoniously, and finally, terminated. *Logan*, 455 U.S. at 438-439.

Since this Court found the act to violate the Due Process Clause of the Fourteenth Amendment, the majority opinion did not reach the equal protection issue. *Logan*, 455 U.S. at 438. However, Justice Blackmun, joined

by Justice Brennan, Justice Marshall, and Justice O'Connor, issued a separate opinion and ruled that the arbitrary classification created by the act violated the Equal Protection Clause as well as the Due Process Clause of the 14th Amendment. *Id.* at 439:

> [C]ertain randomly selected claims, because processed too slowly by the State, are irrevocably terminated without review. In other words, the State converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This, I believe is the very essence of arbitrary state action. *Logan*, 455 U.S. at 442.

Similarly, the classification resulting from the *Hyde* rule created an arbitrary and unreasonable classification by converting similarly situated tort claimants into dissimilarly situated ones based primarily on being fortunate enough to have filed early and to have received swift justice. An arbitrary classification such as this is not consistent with the Equal Protection Clause of the Fourteenth Amendment.

Respondents may argue that the classification created among claimants in *Hyde*, which depends on when their claims were filed, is akin to the classifications created among similarly situated claimants by statutes of limitations which have been upheld against equal protection and due process challenges. See *Carr v. Beech Aircraft Corp.*, 758 F. Supp. 1330 (D. Ariz. 1991); *Mathis v. Eli Lilly and Co.*, 719 F.2d 134 (1983). However, with respect to statutes of limitations, claimants are aware of, or at least are able to discover, the time restraints imposed on them.

At the time of Petitioner's injury, neither *Hyde* nor *Ross* had been decided, so there was no reason to believe there was any necessity of filing suit immediately. The classification created by *Hyde* took effect three years after Petitioners' cause of action accrued and was applied retroactively after suit had been started. Also, statutes of limitations have been determined to be rationally related to the legitimate governmental interest of restricting access to the court system from those with stale claims, where witnesses' memories have faded and evidence lost. The classification created by the *Hyde* rule has no such relation to a legitimate governmental purpose. The Petitioners' cause of action was not stale or factually different than that of a claimant who may have filed suit quickly beating the *Hyde* rule.

B. The Classification Created by *Hyde* Has No Rational Relationship to Any Legitimate Governmental Objective.

In order to pass equal protection scrutiny, this Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Logan*, 455 U.S. at 439 (quoting *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)).

In considering whether the classification created by the *Hyde* rule is rationally related to a legitimate governmental objective, it is necessary to determine what the *Hyde* Court's purpose was in creating the classification.

But this classification was not expressly made, rather it arises out of the retroactivity of Michigan Supreme Court ruling. The *Hyde* Court's only justification for the

retroactive application of its interpretation of *Ross* is that the 1978 *Parker* decision had also been given limited retroactive effect. *Hyde*, 426 Mich. at 241. The *Hyde* Court does not even attempt to assert a legitimate governmental purpose to be served by making its ruling retroactive, and thus creating this arbitrary distinction among similarly situated tort claimants.

Although in determining whether a state action rationally furthers a legitimate governmental goal, the Court may consider either the actual basis for the action or any hypothetical basis on which the State may have acted, *Carr v. Beech Aircraft Corp.*, 758 F. Supp. 1330, 1334 (D. Ariz. 1991), one cannot imagine any legitimate state goal to which this arbitrary distinction rationally relates.

A state's authority to grant immunity to governmental agencies has been recognized as furthering legitimate governmental purposes. Yet, **a state does not have the authority to create arbitrary and unreasonable distinctions in regard to immunity that have no imaginable rational relation to any legitimate governmental purpose**. *Greyhound Food Management*, 653 F. Supp. at 1214.

There can be no legitimate purpose in granting the same governmental agency immunity in one case and not in another depending only on when two identical claimants filed their suits and the speed of the court system.

Even though a legitimate governmental purpose may often be found for granting immunity from tort liability to governmental agencies, any such purpose has been expressly rejected by the Michigan legislature. Since *Parker* in 1978 Michigan governmental hospitals have not been immune from tort liability. When *Ross* redefined

"governmental function" in 1984 without mention of public hospitals, the Michigan Legislature quickly drafted MCL 691.1407(4) making it clear that public hospitals were not immune from tort liability. Clearly, the State of Michigan has advanced no interest in granting public hospitals immunity from tort liability and no legitimate governmental purpose is served by the retroactive rule announced in *Hyde*.

In a similar case, an Ohio act that retroactively barred insurers from bringing subrogation actions against municipalities was found to violate the Equal Protection Clause. *Greyhound Food Management*, 653 F. Supp. at 1214. The act created a classification between subrogated claim holders, whose suits were barred by governmental immunity, and other claim holders, whose suits were not barred. *Id.* The State asserted that the classification was necessary for the protection of the fiscal integrity of state municipalities which were threatened by an increase in liability claims and exposure. *Id.*

The Federal District Court acknowledged that the protection of the fiscal integrity of a state's political subdivisions has been recognized as a legitimate state purpose; however, a state may not accomplish the goal of fiscal integrity by invidious distinctions between classes of its citizens. *Id.*:

> In the present case, the Court simply can find no rational connection between the state's purpose of municipal fiscal soundness and the division of claims against municipalities into those brought by subrogated claim holders (i.e., insurance companies) and other claim holders. While immunity in suits brought by subrogated claim holders certainly saves municipalities money,

> the classification *itself* does nothing to promote fiscal soundness. *Greyhound Food Management*, 653 F. Supp. at 1214.

The Respondents may argue that the *Hyde* rule protects the fiscal integrity of public hospitals so they will not burden taxpayers. But the hospital in this case carried liability insurance, so a tort judgment would not be paid from tax dollars. Even if the hospital did not carry insurance, the asserted objective is certainly not met by the limited period of immunity granted in *Hyde*. Also, the classification itself, as in *Greyhound Food Management*, does nothing to promote the fiscal integrity of public hospitals. In fact, the Michigan legislature did not believe granting public hospitals immunity served any governmental purpose as illustrated by MCL 691.1407(4).

The classification created by the *Hyde* rule is arbitrary and unreasonable in that it treats similarly situated tort claimants differently. Such a classification must be rationally related to a legitimate governmental objective, or it will not survive scrutiny. The classification in *Hyde* has no rational relation to any governmental purpose and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

II. THE RETROACTIVE RULE ANNOUNCED BY THE MICHIGAN SUPREME COURT IN *HYDE V. UNIVERSITY OF MICHIGAN REGENTS* AS APPLIED IN *BLUE* VIOLATES PETITIONERS' RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

A cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.

Logan, 455 U.S. at 428. Moreover, in *Martinez v. California*, 444 U.S. 277, 281-282 (1980), this Court specifically noted that "[a]rguably," a state tort claim is a "species of 'property' protected by the Due Process Clause." The Petitioners' state tort cause of action is therefore a species of property and is protected by the Due Process Clause.

"[A] right of action may be vested, and if so, it becomes property of him in whom it is vested, and the destruction of such a vested right is a violation of the due process clause of the Fourteenth Amendment." *Barr v. Preskitt*, 389 F. Supp. 496, 498.

To determine if the retroactive rule in *Hyde* which abolished Petitioners' cause of action does deprive Petitioners of property without due process, the stage at which a tort cause of action vests must be determined.

A. A Cause of Action in Tort Becomes a Vested Property Right When it Accrues.

The Supreme Court has recognized that vested rights created by statute cannot be abridged by a subsequent statute that effectively takes away accrued causes of action to enforce those rights. See *Coombes v. Getz*, 285 U.S. 434, 435-438 (1932); *Ettor v. Tacoma*, 228 U.S. 148, 155-158 (1913). In *Ettor*, the plaintiff brought an action pursuant to statute against the City of Tacoma to recover for damage to his property by the city's street grading. *Id.* at 149-150. The statute allowing such a suit against the city was amended granting the city immunity from such suits during the pendency of the plaintiff's claim. *Id.* at 150. The Supreme Court of Washington held that the

plaintiff could not recover, but this Court reversed holding the plaintiff had a vested right in his cause of action. *Id.* at 158.

It makes no difference that Petitioners' cause of action was abolished by court made law rather than statutory law as in *Ettor*. Both Petitioners and the plaintiff in *Ettor* were equally deprived of property by an action of the State.

Although the Supreme Court did not specifically determine the question of when a common law tort cause of action vests in *Ettor* or *Coombes*, other federal courts have. In *Hartford Fire Insurance Co v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1367 (6th Cir. 1984), the 6th Circuit ruled that "[a] litigant has no vested property right in a cause of action *until it accrues*." (Emphasis added.) "In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge *until injury actually occurs*." (Emphasis added.) *Mathis v. Eli Lilly and Co.*, 719 F.2d 134, 141 (6th Cir. 1983). Therefore, a tort cause of action accrues and vests when the injury occurs, and the abolition of a cause of action once it accrues is a deprivation of property without due process of law.

Some courts have suggested that common law rights (such as tort suits), as opposed to statutory causes of action, cannot become vested prior to the entry of a final unreviewable judgment. See, *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986); *Jefferson Disposal Co., Inc. v. Parish of Jefferson, LA.*, 603 F. Supp. 1125 (E.D. La. 1985). However, there is no rational reason to distinguish

between causes of action based on statutes and those founded in common law rights.

Michigan law is quite clear on this issue. A tort cause of action is a vested right. *Cuisick v. Feldpausch*, 259 Mich. 349, 353, 243 N.W.2d 226 (1932). A tort cause of action accrues when all elements of that action have occurred. *Campbell v. Detroit*, 51 Mich. App. 34, 38, 214 N.W.2d 337 (1973). And the retroactive application of a change in the law is unconstitutional when it eliminates a vested right. *Campbell*, 51 Mich. App. at 38-39; *Cuisick*, 259 Mich. at 352.

The 7th Circuit has also decided the issue. In *Pitts v. Unarco Industries, Inc.*, 712 F.2d 276, 279 (7th Cir. 1983), the 7th Circuit ruled that a widow's right to sue for her husband's wrongful death vested on the date of his death. Similarly, tort causes of action vest when the injury occurs.

In this case, Petitioner's injury occurred and her cause of action vested on October 18, 1983. On that date, public hospitals were clearly not immune from tort liability. *Parker v. Highland Park*, 407 Mich. 183 (1978). The *Hyde* rule which abolished Petitioners' cause of action was not created until 1986. Petitioners' cause of action had become a vested property right nearly three years prior to the *Hyde* decision and had been in suit almost a year. The abolition of a vested cause of action is a deprivation of property without due process of law. *Ettor*, 228 U.S. 149 (1913).

In *Greyhound Food Management*, the Federal District Court considered a due process question with facts analogous to this case. In January, 1983, flooding occurred at Sinclair Community College which was allegedly caused

by defective water pipes for which the City of Dayton would be liable. *Greyhound Food Management*, 653 F. Supp. at 1210. The initial suit was filed by Greyhound on December 11, 1984, and the insurer also filed suit against the city under a subrogation provision of Greyhound's policy. Pending the consolidation of the action, the Ohio legislature passed Substitute Senate Bill No. 297. The Bill provided that no insurer is entitled to bring an action under a subrogation provision in an insurance contract against a political subdivision. *Id.* at 1211. The Bill was made retroactive to all cases not tried before November 20, 1985, barring the insurer's cause of action.

The Federal District Court ruled that the retroactive grant of immunity to the City of Dayton violated the insurer's right to due process. *Greyhound Food Management*, 653 F. Supp. at 1215:

> Upon the occurrence of an injury, a person acquires a vested right (i.e., a property right protected by the due process clause of the Fourteenth Amendment) in those causes of action arising out of the injury under the state law applicable at the time. Accordingly, the Court must conclude that Substitute Senate Bill No. 297's retroactive application of those limitations on liability deprives the insurers of their vested rights in violation of the due process clause of the Fourteenth Amendment. *Greyhound Food Management*, 653 F. Supp. at 1215.

Similarly, the retroactive grant of immunity to public hospitals by the *Hyde* rule deprives Petitioners of their vested rights in violation of due process. It makes no difference that in *Greyhound Food Management*, the state legislature made the retroactive law, rather than the State

Supreme Court as in *Hyde*. The power and effect of the law is the same whether it be common law or statutory law. Petitioners' cause of action vested three years prior to the *Hyde* rule, and its abolition deprived Petitioners of property without due process of law.

B. The Retroactive Rule Created by *Hyde* has No Rational Relation to a Legitimate Governmental Purpose, and Thus Violates the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause prohibits arbitrary and irrational legislation. *Greyhound Food Management*, 653 F. Supp. at 1216. Although the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, it can only be done to attain a permissible legislative objective. *Silver v. Silver*, 280 U.S. 117, 122 (1929).

Even though governmental immunity itself has withstood due process scrutiny, the retroactive application of such immunity must be tested against the protection afforded by the Due Process Clause. "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Pension Benefit Guaranty Corp. v. R. A. Gray & Company*, 467 U.S. 717, 730 (1984) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)).

This Court has noted in *Martinez v. California*, 444 U.S. 277, 282 (1980), "that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps *an interest in*

protecting the individual citizen from state action that is wholly arbitrary and irrational." (Emphasis added) Here the State's action in creating the retroactive *Hyde* rule is wholly arbitrary and irrational. There is no connection between the *Hyde* rule and any legitimate governmental purpose, real or imagined.

As discussed above, the *Hyde* Court expresses no other purpose in making the rule retroactive than that it had been done in *Parker*. The Michigan legislature has clearly shown that the state's interest is in holding public hospitals liable in tort, not in granting immunity. Any legitimate state interest that can be imagined in support of governmental immunity cannot be rationally related to the limited period of immunity granted by the *Hyde* Court.

In *Greyhound Food Management*, the Federal District Court specifically found that a State could not rely on the legitimacy of governmental immunity in defending the rationality of their retroactive act. *Greyhound Food Management*, 653 F. Supp. at 1218:

> [A]ny exception to the requirement of due process that the power of sovereign immunity might provide is inapplicable to the retroactive application of O. R. C. Section 2744, 05(B), because that statute . . . creates a "new" immunity where the Ohio courts had previously found none to exist. *Greyhound Food Management*, 653 F. Supp. at 1218.

Likewise, the fact that immunity itself may be a legitimate governmental objective does not mean that the retroactive application of new and limited immunity

serves any legitimate purpose, especially since the Michigan legislature has expressly rejected the grant of immunity to public hospitals.

The retroactive rule in *Hyde* violates due process on two levels. The rule deprives Petitioners of property without due process of law by abolishing a vested right, and the retroactive grant of a limited period of immunity to public hospitals does not rationally relate to any legitimate governmental purpose.

CONCLUSION

Petitioners pray that a Writ of Certiorari issue from this Court to review the judgment of the State of Michigan Court of Appeals in *Blue v. Genesee Memorial Hospital, Inc.* In the event that the Petition is granted, Petitioners request that judgment of the Court of Appeals be reversed and that the cause be remanded to the trial court for trial on the merits.

Respectfully submitted,

/s/ C. Robert Beltz
C. Robert Beltz
Attorney for Petitioners

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH S. BLUE and RONALD M. BLUE,

Plaintiffs-Appellants,

v

GENESEE MEMORIAL HOSPITAL, INC.,

Defendant-Appellee,

and

LEONARD L. J. DIAS, M.D., P.C., and LEONARD L. J. DIAS, M.D.,

Defendants.

APR 27 1990
No. 106593

Before: Holbrook, Jr., P.J., and Brennan and Reilly, JJ. PER CURIAM.

Plaintiffs appeal from an order of summary disposition dismissing their malpractice and/or negligence claims against defendant Genesee Memorial Hospital, Inc. on the ground of governmental immunity. We affirm.

* * *

VI

Plaintiffs argue that the retroactive application of the *Ross* reformulation of governmental immunity is unconstitutional as applied to them. In *Hyde, supra,* 241, the

Court mandated that the holdings in *Ross*, including its application to hospitals operated by governmental entities, were retroactively applicable to all cases filed after the January 22, 1985 *Ross* release date and to those cases pending at that time which properly raised a governmental immunity issue. Even though the issue of governmental immunity was not raised in this case until after January 22, 1985, the case itself was commenced after that date. Therefore, *Ross* controls. Prior to *Ross*, public hospitals were not immune from tort liability. See *Parker* v *Highland Park*, 404 Mich 183; 273 NW2d 413 (1978). According to plaintiffs, the rule of limited retroactivity adopted in *Hyde* makes an irrational and arbitrary distinction between those tort claimants filing suit before January 22, 1985, and those filing after, when all such claimants, regardless of the time of their institution of suit, acquired their cause of action prior to the *Ross* decision.

Even if we thought that this contention had some merit, we would be extremely reluctant to hold that a rule set forth by our Supreme Court is unconstitutional, given our posture as an inferior court. Presumably the *Hyde* Court, in devising a rule of retroactivity, thought through the constitutional repercussions of its decision, and a conclusion of constitutional validity can therefore be fairly implied from the holding itself.

Generally, judicial decisions regarding the retroactivity or prospectivity of a new rule of law imposed by judicial decision are free of constitutional constraints. *People* v *Hampton*, 384 Mich 668, 673-674; 187 NW2d 404 (1971). In *Helmer* v *People's Community Hospital Authority*, 161 Mich App 675, 679-680; 411 NW2d 823 (1987), a panel

of this Court held that retroactive application of *Ross* to bar a claim against a public hospital did not deprive the plaintiff of due process. Likewise, we find no constitutional impediment in the application of the *Hyde* rule of retroactivity to this case.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Thomas J. Brennan
/s/ Maureen Pulte Reilly

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF GENESEE

DEBRA BLUE,

Plaintiff-Appellant,

v

GENESEE MEMORIAL HOSPITAL,

Defendant-Appellee.

_____/

Case No:
85-82334-NM

JUDGE JUDITH
A. FULLERTON

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION BEFORE THE HONORABLE JUDITH A. FULLERTON, CIRCUIT JUDGE
Flint, Michigan – Tuesday, January 19, 1988

APPEARANCES:

For the Plaintiff-Appellant:

MR. C. ROBERT BELTZ
444 Church Street
Flint, MI 48502

For the Defendant-Appellee:

MR. THOMAS WINSETT

Court Recorder:
Marion E. Sprague, CER 0642
Certified Court Recorder

* * *

THE COURT: [p. 40] So, as to constitutional issues, that may be the only thing left. It's my belief that there are a number of cases that may, or are gradually working their way through the [p. 41] Court system, in which the applicability, and for the constitutionality of the applicability applied in *Ross* to cases such as this is being considered and the Court itself has had motions

recently in that regard, at least in 1987, the latter part of 1987, and I also agree with the defense in regard; that the Supreme Court had to know, when it made these rules, that cases would be affected – plaintiffs' rights, I guess, would be affected and they make decisions there, and I agree, that based on the test of rational basis, they have made a decision and I don't think it's the position of the Circuit Courts to overrule, or try to read into *Ross* as applied through *Hyde* anything more than what has already been stated, and because of the application of those dates by the Supreme Court, at this time I'm not going to find that there's any violation of the plaintiffs' equal protection or due process rights by the application now of *Ross* and *Hyde* to the Blue case.

* * *

A TRUE COPY
John H. Trecha, Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF GENESEE

DEBORAH S. BLUE and RONALD M. BLUE, Plaintiffs vs. GENESEE MEMORIAL HOSPITAL, INC., LEONARD L. J. DIAS, M.D., PC and LEONARD L. J. DIAS, M.D., Defendants	File No. 85-82334 NM Judge Judith A. Fullerton (P20455)

C. ROBERT BELTZ (P10666)
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Flint, MI 48502

WILLIAM E. JUNGERHELD (P15628)
Attorney for Defendant Genesee
Memorial Hospital Inc.
P.O. Box 3237
Saginaw, MI 48605
(517) 790-0000

ORDER DISMISSING GENESEE MEMORIAL HOSPITAL, INC.

AT A SESSION OF SAID COURT HELD IN THE COURT HOUSE IN THE CITY OF FLINT, COUNTY OF GENESEE, STATE OF MICHIGAN ON THE 19 DAY OF JANUARY, 1988.

PRESENT: HONORABLE JUDITH A. FULLERTON,
CIRCUIT JUDGE PRESIDING

The Motion for Summary Disposition of Defendant Genesee Memorial Hospital, Inc., brought pursuant to MCR 2.116(C)(7), (8), and (10), having come on to be heard, discovery having been ordered and completed on all issues relevant thereto, leave having been given to the parties to amend their pleadings, briefs having been filed, the Court having heard argument in support thereof and in opposition thereto, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion is granted and Plaintiffs' Complaint is hereby dismissed as to Defendant Genesee Memorial Hospital, Inc., with costs to be taxed.

JUDITH A. FULLERTON
P-20455
JUDITH A. FULLERTON
CIRCUIT JUDGE

2-4-88

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Justices

ORDER

Entered: April 30, 1991

89075

DEBORAH S. BLUE and
RONALD M. BLUE,

Plaintiffs-Appellants,

v

GENESEE MEMORIAL
HOSPITAL, INC.,

Defendant-Appellees,

and

LEONARD L.J. DIAS, M.D.,
P.C., and LEONARD L.J. DIAS,

Defendants.

SC: 89075
COA: 106593
LC: 85-082234-NM

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

60425

SEAL I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

April 30, 1991 Corbin R. Davis

Clerk

APPENDIX B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF GENESEE

DEBORAH S. BLUE and RONALD M. BLUE,

Plaintiffs

v

GENESEE MEMORIAL HOSPITAL, INC., LEONARD L. J. DIAS, MD, PC and LEONARD L. J. DIAS, MD,

Defendants

No. 85 82334 NM

JUDGE JUDITH A. FULLERTON (P20455)

****

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WILLIAM E. JUNGERHELD (P15628)
Attorney for Defendant
Genesee Memorial Hospital, Inc.

FRED L. BORCHARD (P11003)
Attorney for Defendants Dias

****

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND MOTION TO AMEND ANSWER

NOW COME the Plaintiffs, Deborah S. Blue and Ronald M. Blue, by their attorney, C. Robert Beltz, and for

their brief in opposition to Defendant's motion for summary disposition and motion to amend answer do state:

FACTS

Deborah S. Blue was admitted to Genesee Memorial Hospital on October 17, 1983. On October 18, 1983, the Plaintiff underwent a tonsillectomy performed by the Defendant, Dr. L. J. Dias. While unconscious, the Plaintiff sustained nerve damage to her left arm as a result of being dropped or positioned incorrectly while under anesthetic. The Defendant Hospital provided the nurse anesthetist and other personnel responsible for Deborah Blue's injury.

* * *

ARGUMENT

I APPLICATION OF HYDE v UNIVERSITY OF MICHIGAN REGENTS, 426 Mich 233 (1986), TO THE PRESENT ACTION IS UNCONSTITUTIONAL

In *Campbell* v *Detroit*, 51 Mich App 34,38 (1973), the Michigan Court of Appeals held that application of the immunity statute, MCL 691.1407, to the Plaintiff's case violated equal protection and due process. The plaintiff was injured on a city sidewalk in November of 1969. The Legislature amended the immunity statute in August of 1970 to eliminate constitutional infirmities, thus barring plaintiff's cause of action against the city if applicable. The plaintiff filed suit in 1972:

> Tort actions accrue at the time when all elements of a cause of action have occurred . . . plaintiff's

> action thus accrued before the later statute was effective and any effect that the statute could have upon it must be measured by the requirements of equal protection and due process.
>
> * * *
>
> Invalidating the plaintiff's present cause of action would also abrogate vested rights by a change in substantive law. Such is not permissible under the the limitations of due process and equal protection. *Campbell* v *supra*, p 38,39.

In the present action, Deborah Blue was injured in October of 1983. Suit was filed in October of 1985. *Hyde* v *University of Michigan Regents*, 426 Mich 223, was decided in October of 1986, three years after Mrs. Blue's cause of action accrued, and one year after suit was filed. According to *Campbell* and the authorities cited below application of *Hyde* to the present action violates equal protection and due process.

Campbell held that an amended immunity statute could not be applied to a tort action where the injury occurred prior to the amendment, even though suit was filed after the amendment. In the present action the suit was already filed when *Hyde* essentially amended the immunity statute to grant county hospitals immunity.

Even if this Court chooses to treat *Ross* v *Consumers Power*, 420 Mich 567 (1984) as the opinion controlling immunity with respect to county hospitals, Mrs. Blue's action is still not barred. She was injured in October of 1983. The *Ross* opinion was issued January 22, 1985.

The result it reached in *Campbell, supra*, is consistent with *Rozier* v *Mich*, No. 82558 (July 20, 1987) in which the Michigan Court of Appeals stated:

> . . . the issue of governmental immunity must be resolved according to the law as it existed at the time the cause of action accrued. *Rozier, supra,* p 7 (see Copy attached)

On October 18, 1983 the date the plaintiff's cause of action accrued, county hospitals were liable for their torts.

In *Cusick* v *Feldpausch,* 259 Mich 349 (1932) the plaintiff was injured while a passenger in the defendant's car on February 3, 1929. On March 27, 1929 legislation went into effect that barred suit by a guest passenger against the owner or operator of a vehicle absent gross negligence. The plaintiff filed suit in November, 1929, contending the old guest passenger statute applied to him. *Cusick, supra,* p 351. This statue only required proof of negligence.

> "All authorities agree that the repeal of a statute does not take away the plaintiff's cause of action under it for damages for an injury to person or property. They rest on the sound doctrine, expressed in *Menges* v *Dentler,* 33 Pa. 495 (75 Am. Dec. 616), * * * that the law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the due course of law is violated." *Cusick, supra,* p 352, citing *Lewis* v *Railroad Co.,* 220 Pa. 317.

In the present action the Legislature did not amend the immunity statute to bar suit against hospitals. Rather the Supreme Court reinterpreted an unchanged statute to bar such claims. This distinction should not affect the applicability of *Cusick, supra,* since the court is looking to the change in law on a vested right. It does not matter whether the courts or the Legislature makes that change.

> "A law can be repealed by the law-giver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another." *Cusick, supra,* p 353

The court noted that a cause of action is property and entitled to protection. *Cusick, supra,* p 353.

In *Koehler* v *DRT Sportservice, Inc.*, 55 Mich App 567 (1974) the plaintiffs were killed by a drunk driver on July 16, 1971. The dramshop act was amended on June 29, 1972 to require a plaintiff to name the intoxicated driver as a defendant in all dramshop actions. The plaintiff Koehler filed suit one day later, but had already settled with the drunk driver, precluding suit against him. *Koehler, supra,* p 567-570. The defendant liquor licensee moved for summary judgment on the basis that plaintiff could not "name and retain" the drunk driver as required by the amended statute. *Koehler, supra,* p 570.

The Michigan Court of Appeals held the retroactive application of the "name and retain" provision to the plaintiff's case violated due process.

> The effect of the amendment is to deprive plaintiff Koehler of a right which existed prior to the amendment. Whether the act is procedural or substantive, the fact remains that plaintiff will

> have no other effective remedy against the tavern establishments if retroactive application is given the joinder amendment. The amendment is just as effective a deprivation of Koehler's right as though the entire right of recovery had been taken away. *Koehler, supra,* p 576.

The equal protection clause is violated when an arbitrary class of citizens are denied privileges by a law that is not rationally related to a legitimate governmental interest. *Fox* v *Employment Security Commission,* 379 Mich 579, 589 (1967); *Shavers* v *Attorney General,* 402 Mich 554, 613 (1978). In the present case that arbitrary class consists of persons who filed suit against county hospitals between January 22, 1985 or had suits pending at that time, up to those tort actions against county hospitals which accrue after July 1, 1986. The class is arbitrary because it is not reasonably related to a rational government interest. Any assertion of the supposed benefits of immunity directly contradicts the legislative mandate of 1986 PA 175. That statute expressly states that county hospitals are not immune from suit. The elected law making body of this state has denounced any interest in providing immunity for county hospitals. As a result granting immunity to Genesee Memorial Hospital in the present case is arbitrary and unrelated to any legitimate governmental interest.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

DEBORAH S. BLUE and RONALD M. BLUE,

Plaintiffs-Appellants

vs.

GENESEE MEMORIAL HOSPITAL, INC.,

Defendant and Appellee

LEONARD L. J. DIAS, M.D., P.C. and LEONARD L. J. DIAS, M.D.,

Defendants

Court of Appeals No. 106593

Lower Court No. 85 82334 NM

****

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and LEONARD L. J. DIAS, M.D.
IN PRO PER
Defendants

****

APPELLANTS' BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

* * *

VI APPLICATION OF HYDE v UNIVERSITY OF MICHIGAN REGENTS, 426 Mich 233; 393 NW2d 847 (1986), TO THE PRESENT ACTION IS UNCONSTITUTIONAL

In *Campbell* v *Detroit*, 51 Mich App 34, 38; 214 NW2d 337 (1973), the Michigan Court of Appeals held that application of the immunity statute, MCL 691.1407; MSA 3.996 (107) to the Plaintiff's case violated equal protection and due process. The plaintiff was injured on a city sidewalk in November of 1969. The Legislature amended the immunity statute in August of 1970 to eliminate constitutional infirmities, thus barring plaintiff's cause of action against the city if applicable. The plaintiff filed suit in 1972:

> Tort actions accrue at the time when all elements of a cause of action have occurred . . . plaintiff's action thus accrued before the later statute was effective and any effect that the statute could have upon its must be measured by the requirements of equal protection and due process.
>
> * * *
>
> Invalidating the plaintiff's present cause of action would also abrogate vested rights by a change in substantive law. Such is not permissible under the limitations of due process and equal protection. *Campbell, supra,* pp 38-39.

In the present action, Deborah Blue was injured October 18, 1983. Suit was filed October 11, 1985. *Hyde* v *University of Michigan Regents*, 426 Mich 223; 393 NW2d 847 was decided in October of 1986, three years after Mrs.

Blue's cause of action accrued, and one year after suit was filed. According to *Campbell* and the authorities cited below application of *Hyde* to the present action violates equal protection and due process.

Campbell held that an amended immunity statute could not be applied to a tort action where the injury occurred prior to the amendment, even though suit was filed after the amendment. In the present action, the suit was already filed when *Hyde* essentially amended the immunity statute to grant county hospitals immunity.

Even if this Court chooses to treat *Ross* v *Consumers Power*, 420 Mich 567 (1984) as the opinion controlling the date immunity was permitted with respect to county hospitals, Mrs. Blue's action is still not barred. She was injured in October of 1983. The *Ross* opinion was issued January 22, 1985. The constitutional infirmity arises from granting immunity on the basis of when suit was filed, as opposed to when the cause of action accrued. This constitutional argument is distinct from those previously addressed by the appellate courts in Michigan.

The result reached in *Campbell, supra,* is consistent with *Rozier* v *Mich*, 161 Mich App 591; 411 NW2d 786 (1987) in which the Michigan Court of Appeals stated:

> . . . the issue of governmental immunity must be resolved according to the law as it existed at the time the cause of action accrued. *Rozier, supra,* p 7 (see Copy attached).

On October 18, 1983, the date the Plaintiff's cause of action accrued, county hospitals were liable for their torts.

In *Cusick* v *Feldpausch*, 259 Mich 349; 243 NW2d 226 (1932), the plaintiff was injured while a passenger in the defendant's car on February 3, 1929. On March 27, 1929, legislation went into effect that barred suit by a guest passenger against the owner or operator of a vehicle absent gross negligence. The plaintiff filed suit in November, 1929, contending the old guest passenger statute applied to him. *Cusick, supra,* p 351. This statue only required proof of simple negligence.

> All authorities agree that the repeal of a statute does not take away the plaintiff's cause of action under it for damages for an injury to person or property. They rest on the sound doctrine, expressed in *Menges* v *Detler*, 33 Pa. 495 (75 Am. Dec. 616). * * * that the law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the due course of law is violated. *Cusick, supra,* p 352, citing *Lewis* v *Railroad Co*, 220 Pa. 317.

In the present action the Legislature did not amend the immunity statute to bar suit against hospitals. Rather the Supreme Court reinterpreted an unchanged statute to bar such claims. This distinction should not affect the applicability of *Cusick, supra,* since the court is looking to the change in law on a vested right. It does not matter whether the courts or the Legislature make that change.

> A law can be repealed by the lawgiver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right.

> It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

Cusick, supra, p 353.

The court noted that a cause of action is property and entitled to protection. *Cusick, supra,* p 353.

In *Koehler* v *DRT Sportservice, Inc,* 55 Mich App 567; 223 NW2d 461 (1974), the plaintiffs were killed by a drunk driver on July 16, 1971. The Dramshop Act was amended on June 29, 1972 to require a plaintiff to name the intoxicated driver as a defendant in all dramshop actions. The plaintiff Koehler filed suit one day later, but had already settled with the drunk driver, precluding suit against him. *Koehler, supra* p 567-570. The defendant liquor licensee moved for summary judgment on the basis that plaintiff could not "name and retain" the drunk driver as required by the amended statute. *Koehler, supra,* p 570.

The Michigan Court of Appeals held the retroactive application of the "name and retain" provision to the plaintiff's case violated due process.

> The effect of the amendment is to deprive plaintiff Koehler of a right which existed prior to the amendment. Whether the act is procedural or substantive, the fact remains that plaintiff will have no other effective remedy against the tavern establishments if retroactive application is given the joinder amendment. The amendment is just as effective a deprivation of Koehler's

> right as though the entire right of recovery had been taken away. *Koehler, supra,* p 576.

The equal protection clause is violated when an arbitrary class of citizens are denied privileges by a law that is not rationally related to a legitimate governmental interest. *Fox* v *Employment Security Commission,* 379 Mich 579, 589; 153 NW2d 644 (1967); *Shavers* v *Attorney General,* 402 Mich 554, 613; 267 NW2d 72 (1978). In the present case that arbitrary class consists of persons who had accrued rights of action before but filed suit after January 22, 1985 against county hospitals. Those persons who had the same accrued rights and were injured on the same day by the same county hospital but started suit before 1-22-85 suffer no bar. What possible legitimate governmental interest can be served by this distinction? Prospective immunity was a judicial gift. Retrospective immunity takes away vested rights. The class is arbitrary because it is not reasonably related to a rational government interest. Any assertion of the supposed benefits of immunity directly contradicts the legislative mandate of 1986 PA 175. That statute expressly states that county hospitals are not immune from suit. The elected law making body of this state has denounced any interest in providing immunity for county hospitals. As a result, granting immunity to Genesee Memorial Hospital in the present case is arbitrary and unrelated to any legitimate governmental interest.

A careful reading of *Hyde, supra,* shows that the Court did not consider the constitutionality of its decision to grant immunity retroactively. In fact, the majority expressly declined to decide the plaintiffs' constitutional issues.

> Plaintiffs raise several equal protection and due process arguments. We do not decide these questions because they were not raised in, or decided by, the lower courts. *Hyde, supra,* p 244.

WE RAISE THE ISSUES HERE AS WE DID IN THE TRIAL COURT.

The Michigan Supreme Court recently granted leave to appeal in *Stein* v *Southeastern Michigan Family Planning Project, Inc.*, 429 Mich. 861 (1987), on the issue of governmental immunity, Justice Levin stated in *Stein*:

> I would not limit the grant of leave to appeal, but would rather grant leave to appeal to consider all the issues raised by plaintiffs-appellants.
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> The opinion of the Court of Appeals, 158 Mich App 703; 405 NW2d 147 (1987), does not purport to adequately address the equal protection and due process issues.

At least one Supreme Court Justice is concerned with the constitutionality of *Hyde*. The Supreme Court is possibly waiting for the right case to determine it. The Plaintiffs challenge the constitutionality of applying *Hyde* to their cause of action in Argument I, in its original Brief in Opposition to Defendant's Motion for Summary Disposition. The cases cited by Appellants set forth fundamental constitutional tenets recognized in Michigan.

> 1. A tort action is a vested right, *Cusick, supra,* p. 353.
>
> 2. A tort action accrues when all elements of that action have occurred. *Campbell, supra,* p 38.
>
> 3. The retroactive application of a change in the law is unconstitutional when it eliminates a vested right. *Campbell, supra,* p 38, 39; *Cusick, supra,* p 352.

Deborah S. Blue's cause of action arose on October 18, 1983. On October 18th, 1983, public general hospitals were liable in tort for negligence. If the Plaintiff had brought suit the day after she was injured, the Defendant would not have been entitled to immunity.

This is where the heart of Plaintiffs' constitutional attack on the application of *Hyde, supra,* lies. Plaintiffs are not challenging MCL 691.1401, et seq.; MSA 3.996(107) et seq., because it treats government hospitals in an arbitrary and capricious manner when compared to private hospitals. Rather, Plaintiffs are challenging the constitutionality of a judicial decision that potentially treats the same cause of action on behalf of the same Plaintiff differently and takes away a vested right.

Application of *Hyde* to the present action also gives rise to a constitutional argument that has not been decided by Michigan Courts. Genesee Memorial Hospital, Inc. (GMHI) is a private hospital. If a private hospital is granted governmental immunity, victims of negligence by that hospital are treated in an arbitrary and capricious manner as compared to victims of negligence at other private hospitals. This is a violation of equal protection and due process.

STATE OF MICHIGAN
IN THE SUPREME COURT

DEBORAH S. BLUE AND
RONALD M. BLUE,

Plaintiffs-Appellants

vs.

GENESEE MEMORIAL HOSPITAL, INC.,

Defendant-Appellee

and

LEONARD L. J. DIAS, M.D., P.C. and LEONARD L. J. DIAS,

Defendant

* *

Supreme Court
No.

Court of Appeals
No. 106593

Lower Court
No. 85-82334-NM
Judge
Judith A.
Fullerton

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* *

APPLICATION FOR LEAVE TO APPEAL

* * *

VI. APPLICATION OF HYDE v UNIVERSITY OF MICHIGAN REGENTS, 426 MICH 233; 393 NW2D 847 (1986), TO THE UNIQUE FACTS IN THE PRESENT ACTION IS UNCONSTITUTIONAL.

In *Campbell* v *Detroit*, 51 Mich App 34, 38; 214 NW2d 337 (1973), the Michigan Court of Appeals held that application of the immunity statute, MCL 691.1407; MSA 3.996 (107) to the plaintiff's case violated equal protection and due process. The plaintiff was injured on a city sidewalk in November of 1969. The Legislature amended the immunity statute in August of 1970 to eliminate constitutional infirmities, thus barring plaintiff's cause of action against the city if applicable. The plaintiff filed suit in 1972:

> Tort actions acrue [sic] at the time when all elements of a cause of action have occurred . . . plaintiff's action thus accrued before the later statute was effective and any effect that the statute could have upon it must be measured by the requirements of equal protection and due process.
>
> * * *
>
> Invalidating the plaintiff's present cause of action would also abrogate vested rights by a change in substantive law. Such is not permissible under the limitations of due process and equal protection. *Campbell, supra*, pp 38-39.

In the present action, Deborah Blue was injured October 18, 1983. Suit was filed October 11, 1985. *Hyde* v *University of Michigan Regents*, 426 Mich 223; 393 NW2d

847 was decided in October of 1986, three years after Mrs. Blue's cause of action accrued, and one year after suit was filed. According to *Campbell* and the authorities cited below, application of *Hyde* to the present action violates equal protection and due process.

Campbell held that an amended immunity statute could not be applied to a tort action where the injury occurred prior to the amendment, even though suit was filed after the amendment. In the present action, the suit was already filed when *Hyde* essentially amended the immunity statute to grant county hospitals immunity.

Even if this court chooses to treat *Ross* v *Consumers Power*, 420 Mich 567 (1984) as the opinion controlling the date immunity was permitted with respect to county hospitals, Mrs. Blue's action is still not barred. She was injured in October 1983. The *Ross* opinion was issued January 22, 1985. The constitutional infirmity arises from granting immunity on the basis of when suit was filed, as opposed to when the cause of action accrued. This constitutional argument is distinct from those previously addressed by the appellate courts in Michigan.

The result reached in *Campbell, supra,* is consistent with *Rozier* v *Mich,* 161 Mich App 591; 411 NW2d 786 (1987) in which the Michigan Court of Appeals stated:

> . . . the issue of governmental immunity must be resolved according to the law as it existed at the time the cause of action accrued. *Rozier, supra* p 7 (see copy attached).

On October 18, 1983, the date the Plaintiffs' cause of action accrued, county hospitals were liable for their torts.

In *Cusick* v *Feldpausch*, 259 Mich. 349; 243 NW2d 226 (1932) the plaintiff was injured while a passenger in the defendant's car on February 3, 1929. On March 27, 1929, legislation went into effect that barred suit by a guest passenger against the owner or operator of a vehicle absent gross negligence. The plaintiff filed suit in November, 1929, contending the old guest passenger statute applied to him. *Cusick, supra*, p 351. This statute only required proof of simple negligence.

> All authorities agree that the repeal of a statute does not take away the plaintiff's cause of action under it for damages for an injury to person or property. They rest on the sound doctrine, expressed in *Menges* v *Detler*, 33 Pa. 495 (75 Am. Dec. 616). * * * that the law of the case at that time when it became complete is an inherent element in it; and, if changed or annulled, the law is annulled, justice denied, and the due course of law is violated.

In the present action, the Legislature did not amend the immunity statute to bar suit against hospitals. Rather the Supreme Court reinterpreted an unchanged statute to bar such claims. This distinction should not affect the applicability of *Cusick*, supra, since the court is looking to the change in law on a vested right. It does not matter whether the courts or the Legislature make that change.

> A law can be repealed by the lawgiver; but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of

> the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another. *Cusick, supra,* p 353.

The court noted that a cause of action is property and entitled to protection. *Cusick, supra,* p 353.

In *Koehler* v *DRT Sportservice, Inc,* 55 Mich App 567; 223 NW2d 461 (1974), the plaintiffs were killed by a drunk driver on July 16, 1971. The Dramshop Act was amended on June 29, 1972 to require a plaintiff to name the intoxicated driver as a defendant in all dramshop actions. The plaintiff Koehler filed suit one day later, but had already settled with the drunk driver, precluding suit against him. *Koehler, supra,* pp 567-570. The defendant liquor licensee moved for summary judgment on the basis that plaintiff could not "name and retain" the drunk driver as required by the amended statute. *Koehler, supra,* p 570.

The Michigan Court of Appeals held the retroactive application of the "name and retain" provision to the plaintiff's case violated due process.

> The effect of the amendment is to deprive plaintiff Koehler of a right which existed prior to the amendment. Whether the act is procedural or substantive, the fact remains that plaintiff will have no other effective remedy against the tavern establishments if retroactive application is given the joinder amendment. The amendment is just as effective a deprivation of Koehler's right as though the entire right of recovery had been taken away. *Koehler, supra,* p 576.

The equal protection clause is violated when an arbitrary class of citizens are denied privileges by a law that is not rationally related to a legitimate governmental interest. *Fox* v *Employment Security Commission*, 379 Mich 579, 589; 153 NW2d 644 (1967); *Shavers* v *Attorney General*, 402 Mich 554, 613; 267 NW2d 72 (1978). In the present case that arbitrary class consists of persons who had accrued rights of action before but filed suit after January 22, 1985 against county hospitals. Those persons who had the same accrued rights and were injured on the same day by the same county hospital but started suit before January 22, 1985 suffer no bar. No possible legitimate governmental interest can be served by this distinction. Prospective immunity was a judicial gift. Retrospective immunity takes away vested rights. The class is arbitrary because it is not reasonably related to a rational government interest. Any assertion of the supposed benefits of immunity directly contradicts the legislative mandate of 1986 PA 175. That statute expressly states that county hospitals are not immune from suit. The elected law making body of this state has denounced any interest in providing immunity for county hospitals. As a result, granting immunity to Genesee Memorial Hospital in the present case is arbitrary and unrelated to any legitimate governmental interest.

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> Plaintiffs raise several equal protection and due process arguments. We do not decide these

> questions because they were not raised in, or decided by, the lower courts. *Hyde, supra,* p 244.

The constitutional due process issue was specifically raised before the trial court and Court of Appeals.

The Michigan Supreme Court recently granted leave to appeal in *Stein* v *Southeastern Michigan Family Planning Project Inc.,* 429 Mich 861 (1987). On the issue of governmental immunity Justice Levin stated in *Stein*:

> I would not limit the grant of leave to appeal, but would rather grant leave to appeal to consider all the issues raised by plaintiffs-appellants.
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> The opinion of the Court of Appeals, 158 Mich App 703; 405 NW2d 147 (1987), does not purport to adequately address the equal protection and due process issues.

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This is where the heart of Plaintiffs' constitutional attack on the application of *Hyde, supra,* lies. Plaintiffs are not challenging MCL 691.1407, et seq.; MSA 3.996(107), et seq., because it treats government hospitals in an arbitrary and capricious manner when compared to private hospitals. Rather, Plaintiffs are challenging the constitutionality of a judicial decision that potentially treats the same cause of action on behalf of the same Plaintiff differently and takes away a vested right.

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Appellants respectfully request leave to appeal the above constitutional issues.

Beltz & Associates

/s/ C. Robert Beltz
C. ROBERT BELTZ (P10666)
Attorney for Plaintiffs-Appellants

Dated: May 17, 1990

Supreme Court, U.S.
FILED
AUG 1 1991
OFFICE OF THE CLERK

(2)

No. 91-79

In The

Supreme Court of the United States

October Term, 1991

DEBORAH S. BLUE AND RONALD M. BLUE,

Petitioners,

v.

GENESEE MEMORIAL HOSPITAL, INC.,

Respondent.

Petition For Writ Of Certiorari To The State Of Michigan Court Of Appeals

SUPPLEMENTAL APPENDIX

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STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH S. BLUE and RONALD M. BLUE, Plaintiffs-Appellants, v GENESEE MEMORIAL HOSPITAL, INC., Defendant-Appellee, and LEONARD L. J. DIAS, M.D., P.C., and LEONARD L. J. DIAS, M.D., Defendants.	APR 27 1990 No. 106593

Before: Holbrook, Jr., P.J., and Brennan and Reilly, JJ.
PER CURIAM.

Plaintiffs appeal from an order of summary disposition dismissing their malpractice and/or negligence claims against defendant Genesee Memorial Hospital, Inc. on the ground of governmental immunity. We affirm.

I

Plaintiffs' claims are based on injuries sustained by plaintiff Deborah Blue as a result of alleged malpractice and/or negligent medical care afforded her during a period of hospitalization in October of 1983. Plaintiffs' primary argument is that governmental immunity is inapplicable because the hospital is now operated by

defendant, a private non-profit corporation, even though it was owned and operated by the County of Genesee through its Board of County Institutions at the time of Blue's hospitalization. Despite its change in ownership from public to private status, the hospital was and is known, at all pertinent times, as Genesee Memorial Hospital.

A

The history of the legal status of the hospital at all times pertinent to this case is largely undisputed. Several months after Blue was hospitalized, on January 1, 1984, hospital operations were turned over by the county to defendant corporation, and the county relinquished all hospital assets in the transfer procedure. The transfer was accomplished pursuant to an agreement requiring defendant to assume certain liabilities for injuries arising from the rendering of professional services during prior times of the county's operation (apparently inclusive of the instant case). Although a fair amount of public controversy preceded the transfer, the transfer itself was accomplished without any break or disruption of operations.

Although the hospital's transformation into a private entity occurred in 1984, the impetus for the reorganization relates back at least to 1980 when a health systems agency plan for eliminating excess hospital bed capacity in the local area was issued. The plan required Genesee Memorial Hospital to seek consolidation or merger with another hospital in order to avoid closure. The then county-owned hospital reached an agreement for affiliation with McLaren General Hospital, and, pursuant to

this agreement, defendant's corporate entity was formed in 1981 in order to acquire the hospital. Consummation of the reorganization was deferred until the resolution of litigation instituted by another area hospital attempting to prevent the affiliation. Prior to the county's relinquishment of the hospital and its operations on January 1, 1984, defendant remained a corporate shell without assets.

B

Because the hospital was county-owned and -operated at the time that plaintiffs' cause of action arose, the circuit court concluded that the tort claims against defendant were barred by governmental immunity. Plaintiffs now argue that the court thereby impermissibly conferred immunity on a private corporation. (The county is not a party to this suit.)

We disagree. The bar of the doctrine of governmental immunity is not a defense personal to the particular defendant being sued, but rather it is an inherent characteristic of the particular governmental entity responsible for the acts or conduct that provide the basis for the tort claim. *Ross v Consumers Power Co (On Reh)*, 420 Mich 562, 621, n 34; 363 NW2d 641 (1984). It is the status of the tortfeasor as a public or private entity at the time that the cause of action arose that is controlling. A publicly owned hospital cannot go private and thereby divest itself of immunity for acts for which tort liability was previously precluded. A change in ownership does not revive liability that did not previously exist.

Thus, plaintiffs' argument misses the point. The circuit court did not confer immunity on a private corporation; it instead recognized that a claim barred by immunity does not thereby become actionable by reason of a subsequent change in ownership. All factual events fixing liability or non-liability had already occurred prior to the reorganization. We discern no reason in law or policy why defendant, as the successor corporation to a public hospital, should be deemed to have contracted for or to have assumed any greater liability than that attaching to the governmental entity responsible for alleged tortious conduct.

C

We also do not agree with plaintiffs' contention that the county and defendant corporation should be regarded as effectively one merged public entity as of the time that the acts constituting plaintiffs' claim occurred. At that time, defendant was a non-functioning corporation formed in anticipation of its future acquisition of hospital operations. There is no allegation or indication of any fraud, illegality, or improper or unjust use of the corporate form that would justify a disregard of defendant's separate corporate entity. See *Soloman v Western Hills Development Co (After Remand)*, 110 Mich App 257; 312 NW2d 428 (1981). Nor is there any indication that the two entities (the Board of County Institutions and the private corporation) were conducted without a separation of records, board meetings, or other institutional formalities. On the contrary, the reasons for maintaining defendant as a separate corporation appear to be entirely legitimate and consistent with public policy. See *Helzer v F Joseph*

Lamb Co, 171 Mich App 6, 9-10; 429 NW2d 835 (1988), lv den 432 Mich 885 (1989).

We conclude that the doctrine of governmental immunity is applicable to claimed tortious acts performed in a hospital that was county-owned and -operated at the time that the acts occurred.

II

Plaintiffs argue that, at the time of Blue's hospitalization, the hospital was not operating pursuant to law, as required by the principles of immunity set forth in *Ross, supra*, and *Hyde v University of Michigan Board of Regents*, 426 Mich 227; 393 NW2d 847 (1986). We disagree. County ownership and operation of a hospital are expressly authorized by statute. See MCL 331.151 *et seq.*; MSA 14.1131 *et seq.*, MCL 400.151 *et seq.*; MSA 14.1100(1) *et seq.* The operation of a hospital implicitly requires care and treatment of its patients. *Hyde, supra*, 247. Although the statutes expressly mention treatment of tuberculosis as a purpose for operating county hospitals, the functions of such hospitals are not limited to infectious diseases. Even if Genesee Memorial Hospital did begin its existence as a tuberculosis hospital, its statutory authorization was broad enough to encompass the treatment of Blue, the injured plaintiff.

The allegation that the hospital reorganization contemplated in 1981 and consummated on January 1, 1984, was motivated in part by a desire to preserve its employees' jobs does nothing to take hospital operations outside the ambit of its statutory authorization. These subjective considerations of hospital management do not

alter the status of the hospital as the county's exercise of a governmental function.

Similarly, the issuance of a health systems plan requiring the hospital either to seek reorganization or to be closed did not change the statutory authorization of the county to operate a hospital. The plan was issued pursuant to provisions of the Public Health Code requiring the identification and elimination of excess bed capacity. It contemplated that Genesee Memorial Hospital be either merged or consolidated with another hospital or subjected to closure, but its closure requirement was not intended to be enforced immediately. See 1978 PA 368, MCL 333.22101 *et seq.*; MSA 14.15(22101) *et seq.* [now MCL 333.22201 *et seq.*; MSA 14.15(22201) *et seq.*]. Until such time that the county divested itself of ownership of the hospital or closed the hospital in compliance with the plan, its statutory authority remained intact.

We conclude that the operation of a hospital and care of plaintiff Deborah Blue were in pursuance of a governmental function.

III

Plaintiffs argue that the hospital's history of profitable operations indicates that it was engaged in a proprietary function excepted from governmental immunity by MCL 691.1413; MSA 3.996(113). In *Hyde, supra*, 257-258, the Court indicated that this issue is to be resolved by a two-part inquiry. A governmental activity is proprietary if: (1) the activity is conducted primarily for the purpose of producing a profit, and (2) the activity cannot normally be supported by fees or taxes. Although the existence of a

profitable history of operations is relevant to the first inquiry, it is not conclusive. *Id.*, 258-259. If any profit is applied to finance unrelated functions of the governmental entity owning the profitable operation, instead of being applied to current and long-range expenditures associated with the operation of the profit-making function, this use of excess funds is indicative of a primary profit-oriented purpose. *Id.*, 259.

Plaintiffs have failed to demonstrate a primary purpose to produce a profit. An excess of income over expenses was realized in only two of the last four years that the county operated the hospital, hardly a compelling indication of a profit-oriented purpose. Some of the purchase price paid to the county for the hospital was financed out of the hospital's cash on hand, but this says little about the purpose for county operation of the hospital prior to the transfer of its assets to defendant corporation. Defendant established by affidavit that all excess revenues were segregated from the county's general funds and that these revenues were devoted only to hospital functions. We conclude that plaintiffs have failed to demonstrate any genuine issue of material fact or to controvert the documented lack of a profit-making purpose for hospital operations. See also *Totsky v Henry Ford Hospital*, 169 Mich App 286, 290-292; 425 NW2d 531 (1988).

Moreover, defendant submitted an affidavit that indicates, apparently without contradiction, that "Genesee Memorial Hospital was financed normally by fees for services provided." This assertion is consistent with the hospital's financial statements showing the sources of its income. The conclusion emerges that the hospital was

intended to be a self-sustaining operation. Thus, the operation of the county hospital fails to satisfy the second part of the proprietary function test, that it not normally be supported by taxes or fees.

We conclude that the county's operation of Genesee Memorial Hospital was not in discharge of a proprietary function at the time of the acts or conduct serving as the basis for plaintiffs' claim.

IV

Plaintiffs argue that the circuit court should not have granted defendant leave to amend its pleadings in order to raise governmental immunity as a defense. We find no abuse of discretion on the part of the trial court in granting defendant leave to amend, especially when we consider the law in existence at the time.

Plaintiffs make a related argument that defendant should be estopped by its own affirmative acts from raising governmental immunity as an issue in this case. The elements of an equitable estoppel are: (1) the party by representations, admissions, or silence intentionally or negligently induces another to believe facts (2) the other party justifiably relies and acts upon this belief and (3) the other party will be prejudiced if the first party is permitted to deny those facts. *City of Holland v Manish Enterprises*, 174 Mich App 509, 514; 436 NW2d 398 (1988). If silence is relied to establish an estoppel, the party thereby concealing its rights must by this course of conduct have shown such gross negligence as to have knowingly encouraged or influenced the other party, who is

wholly ignorant of the true state of affairs, to act to his or her detriment. *Commercial Union Ins Co v Medical Protective Co*, 136 Mich App 412, 422; 356 NW2d 648 (1984), modified 426 Mich 109; 393 NW2d 479 (1986). Where a plaintiff from the outset should have known those facts bringing the case within the bar of governmental immunity, the defendant will not be estopped from asserting its immunity. See *Beyer v Fraternal Order of Eagles, Aerie No 668*, 123 Mich App 492, 499; 333 NW2d 314 (1983).

In this case, none of the allegations made by plaintiffs are sufficient as a matter of law to invoke an estoppel and defendant is under no affirmative obligation to volunteer whether the claimed tortious acts were committed by a public or private entity. Absent any allegation that defendant attempted to conceal facts supporting an immunity claim or thwarted plaintiffs' attempts at discovery of the same, it is difficult to see how defendant's silence, i.e., its delay in asserting immunity, induced or misled plaintiffs to believe otherwise. Indeed, defendant would have had no plausible incentive to conceal immunity as an issue; the delay in raising it appears to have been caused by defendant's own belated realization of the applicability of the doctrine. There is simply no indication that any of defendant's employees or agents misrepresented or did anything calculated to misrepresent the hospital's governmental status prior to defendant's acquisition of the hospital on January 1, 1984. Although plaintiffs suggest that the advice of rights in the arbitration form offered to Blue pursuant to the Medical Malpractice Arbitration Act lulled them into believing that

they had a right to obtain an adjudication of liability, nothing in that form disclaimed governmental immunity.

V

Plaintiffs argue that their claimed injuries arising from improper medical care are actionable in contract, thereby evading the strictures of governmental immunity. Specifically, plaintiffs raise three theories from which they claim that a contractual duty can be imposed upon defendant: (1) the arbitration agreement signed and later revoked pursuant to the Medical Malpractice Arbitration Act, (2) plaintiffs' personal check in payment of hospital services, which was endorsed by defendant, and (3) breach of an implied contractual duty by the hospital in the course of its care and treatment of Deborah Blue. However, a contractual theory of recovery for deficient medical care requires identification of a special agreement to perform a specific undertaking by the health care provider for the purpose of accomplishing a certain act or result. See *Penner v Seaway Hospital*, 169 Mich App 502, 508-510; 427 NW2d 584 (1988). Plaintiffs do not explain how any of their dealings with the hospital give rise to a contractual duty to provide a specific standard of care or to warrant a certain result in Blue's treatment. Having reviewed copies of the pertinent documents supplied by plaintiffs, we do not see any clause from which it may be understood or fairly implied that defendant contracted to guarantee plaintiffs any particular standard of care. Because plaintiffs have failed to identity any special contractual duty or to cite any legal authority supporting their argument, we conclude that they have failed as a

matter of law to raise any viable theory of recovery in contract.

VI

Plaintiffs argue that the retroactive application of the *Ross* reformulation of governmental immunity is unconstitutional as applied to them. In *Hyde, supra,* 241, the Court mandated that the holdings in *Ross,* including its application to hospitals operated by governmental entities, were retroactively applicable to all cases filed after the January 22, 1985 *Ross* release date and to those cases pending at that time which properly raised a governmental immunity issue. Even though the issue of governmental immunity was not raised in this case until after January 22, 1985, the case itself was commenced after that date. Therefore, Ross controls. Prior to *Ross,* public hospitals were not immune from tort liability. See *Parker v Highland Park,* 404 Mich 183; 273 NW2d 413 (1978). According to plaintiffs, the rule of limited retroactivity adopted in *Hyde* makes an irrational and arbitrary distinction between those tort claimants filing suit before January 22, 1985, and those filing after, when all such claimants, regardless of the time of their institution of suit, acquired their cause of action prior to the *Ross* decision.

Even if we thought that this contention had some merit, we would be extremely reluctant to hold that a rule set forth by our Supreme Court is unconstitutional, given our posture as an inferior court. Presumably the *Hyde* Court, in devising a rule of retroactivity, thought through the constitutional repercussions of its decision, and a

conclusion of constitutional validity can therefore be fairly implied from the holding itself.

Generally, judicial decisions regarding the retroactivity or prospectivity of a new rule of law imposed by judicial decision are free of constitutional constraints. *People v Hampton*, 384 Mich 668, 673-674; 187 NW2d 404 (1971). In *Helmer v People's Community Hospital Authority*, 161 Mich App 675, 679-680; 411 NW2d 823 (1987), a panel of this Court held that retroactive application of *Ross* to bar a claim against a public hospital did not deprive the plaintiff of due process. Likewise, we find no constitutional impediment in the application of the *Hyde* rule of retroactivity to this case.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Thomas J. Brennan
/s/ Maureen Pulte Reilly

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(3)

No. 91-79

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Petitioners,

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Respondent.

Petition For Writ Of Certiorari To The State Of Michigan Court Of Appeals

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QUESTION PRESENTED

In an unpublished opinion per curium released on April 27, 1990, the Court of Appeals of the State of Michigan affirmed the Trial Court's grant of Summary Disposition to Respondent, Genesee Memorial Hospital, Inc. It was the position of Respondent that Petitioners' cause of action was barred by statutory immunity as construed by **ROSS v. CONSUMERS POWER CO. (On Reh.), 420 MICH. 567; 363 N.W.2d 641 (1984)** and **HYDE v. UNIVERSITY OF MICHIGAN BOARD OF REGENTS, 426 MICH. 227; 393 N.W.2d 847 (1986)**. Inter alia, Petitioners argued that **HYDE's** limited retractive application of the **ROSS** reformulation of statutory governmental immunity unconstitutionally denied them due process and equal protection of the law. The Court of Appeals disagreed, noting that **ROSS** controlled because Petitioners' case was commenced *after* **ROSS** was decided. The Court of Appeals observed that the Michigan Supreme Court had the constitutional power to decide what law the state courts would apply in Michigan and that judicial decisions regarding retroactivity or prospectivity of a new rule of law imposed by judicial decision are generally free of constitutional restraints. As a result, it found that there was no constitutional impediment in this case.

The question presented is whether the rule of limited retoractivity applicable to **ROSS** which was announced in **HYDE** violates Petitioners' rights to due process and equal protection of the law.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

ARGUMENT 5

The rule of limited retroactivity announced in HYDE v. UNIVERSITY OF MICHIGAN BOARD OF REGENTS, 426 MICH. 227; 393 N.W.2d 847 (1986) does not violate Petitioners' rights to due process and equal protection of the law. 5

CONCLUSION 14

TABLE OF AUTHORITIES

Page

FEDERAL CASES

ALLEN v. STATE BOARD OF ELECTIONS, 393 U.S. 544, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969) 7

BONNER v. GORMAN, 213 U. S. 86, 91, 53 L. Ed. 709, 29 S. Ct. 483 (1909) 8, 9

CHEVRON OIL CO. v. HUSON, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) 6, 7

CIPRIANO v. CITY OF HOUMA, 395 U.S. 701, 23 L. Ed. 2d 647, 89 S. Ct. 1897 (1969) 7

DESIST v. UNITED STATES, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969) 8

FLEMING v. FLEMING, 264 U.S. 29, 68 L. Ed. 547, 44 S. Ct. 246 (1924) 6

GREAT NORTHERN RAILWAY CO. v. SUNBURST OIL & REFINING CO., 287 U.S. 358, 364, 77 L. Ed. 316, 53 S. Ct. 145 (1932) 8, 9

HANOVER SHOE v. UNITED SHOE MACHINERY CORP., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968) 6, 7

LINKLETTER v. WALKER, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965) 5, 6, 7, 8, 9

MILWAUKEE ELECTRIC RAILWAY CO. v. MILWAUKEE, 252 U.S. 100, 106, 64 L. Ed. 476, 40 S. Ct. 306 (1920) 8, 9

PATTERSON v. COLORADO, 205 U.S. 454, 51 L. Ed. 879, 27 S. Ct. 556 (1907) 8, 9

STRIKER v. PANCHER, 317 F. 2d 780 (6th Cir., 1963) 6

TABLE OF AUTHORITIES – Continued

Page

TIDAL OIL CO. v. FLANAGAN, 253 U.S. 444, 68 L. Ed. 382, 44 S. Ct. 197 (1924) 8, 9

UNITED STATES v. JOHNSON, 457 U.S. 537, 73 L. Ed. 2d 202, 102 S. Ct. 2579 (1982) 6

WILLIAMS v. UNITED STATES, 401 U.S. 646, 28 L. Ed. 2d 388, 91 S. Ct. 1148 (1971) 8

WORCESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 299, 82 L. Ed. 268, 58 S. Ct. 185 (1937) ... 8, 9

MICHIGAN CASES

GUSLER v. FAIRVIEW TUBULAR PRODUCTS, 412 MICH. 270; 315 N.W.2d 388 (1981) 11

HELMER v. PEOPLE'S COMMUNITY HOSPITAL AUTHORITY, 161 MICH. APP. 675; 411 N.W.2d 823 (1987) 4

HYDE v. UNIVERSITY OF MICHIGAN BOARD OF REGENTS, 426 MICH. 227; 393 N.W.2d 847 (1986) ..... *passim*

PARKER v. CITY OF HIGHLAND PARK, 404 MICH. 183; 273 N.W.2d 413 (1978) 2, 10, 12, 13

ROSS v. CONSUMERS POWER CO. (On Reh.), 420 MICH. 567; 363 N.W.2d 641 (1984) ..... *passim*

TEBO v. HAVLIK, 418 MICH. 350; 343 N.W.2d 181 (1984) 11

MICHIGAN STATUTES

1986 PA 175 3

MCL 691.1404, et seq.; MSA 3.996 (101) et seq. 2, 3

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Michigan is unreported and is printed in its entirety in Petitioners' Supplemental Appendix. The excerpted Opinion of the Circuit Court of Genesee County, Judgment of the Circuit Court of Genesee County, and Denial of Leave to Appeal of the Michigan Supreme Court are printed in Petitioners' Appendix A, pp. 4a, 6a, and 8a, respectively.

STATEMENT OF THE CASE

On October 11, 1985, Petitioners Ronald and Deborah Blue brought suit against Respondent, Genesee Memorial Hospital, Inc. in the Circuit Court for the County of Genesee, Michigan, alleging professional negligence by nurses and a nurse anesthetist in positioning and/or movement of Mrs. Blue while she was under general anesthesia during the performance of a routine tonsillectomy on October 17, 1983. Petitioners also sued the surgeon and his professional corporation, Leonard L. J. Dias, M.D., P.C., and Leonard L. J. Dias, M.D., alleging professional negligence. The action against Dr. Dias and his professional corporation, has been stayed pending the outcome of the instant appellate proceedings.

At the time of Mrs. Blue's surgery, Genesee Memorial Hospital was a public general hospital owned and operated by Genesee County, Michigan. On January 1, 1984, Genesee Memorial Hospital became a private corporation, Genesee Memorial Hospital, Inc., Petitioner herein.

See Opinion of the Court of Appeals, §I, pp. 1-4, found at Supplemental Appendix, pp. 1-5.

In 1964, the Michigan Legislature enacted a governmental immunity act. **MCL 691.1404, et seq.; MSA 3.996 (101) et seq.** The act was later amended in 1971 and 1986.

In 1978, the Michigan Supreme Court held that the operation of a public general hospital is not a governmental function entitled to immunity from tort liability under **MCL 691.1407; MSA 3.996 (107). PARKER v. CITY OF HIGHLAND PARK, 404 MICH. 183; 273 N.W.2d 413 (1978).**

In 1984, following years of grappling with the concept of "governmental function", the Michigan Supreme Court reformulated the definition of "governmental function" as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law." **ROSS v. CONSUMERS POWER CO. (On Reh.), 420 MICH. 567, 620; 364 N.W.2d 641 (1984).** Although decided on December 28, 1984, the **ROSS** decision was released on January 22, 1985.

In 1986, the Michigan Supreme Court held that the **ROSS** definition of "governmental function" which replaced the earlier definition in **PARKER** would be given limited retroactive effect in cases involving public general hospitals: "Sovereign or governmental immunity from tort liability will be extended to a governmental agency operating a public general hospital or medical facility only in those cases involving a cause of action accruing prior to July 1, 1986, which was pending on or after January 22, 1985, or commenced on or after that date." (Footnote omitted) **HYDE v. UNIVERSITY OF**

MICHIGAN BOARD OF REGENTS, 426 MICH. 233, 246; 393 N.W.2d 847 (1986).

The decision in **HYDE** was argued on March 4, 1986 and decided on October 3, 1986. In the interim, on July 7, 1986, the Michigan Legislature amended the governmental immunity act and formally adopted the Michigan Supreme Court's definition of "governmental function". See **1986 PA 175; MCL 691.1401 (f); MSA 3.996 (101) (f)**. The amendatory provision also provided that, with the exception of hospitals owned or operated by the Departments of Mental Health or Corrections, public general hospitals or county medical care facilities were not entitled to statutory immunity. See **1986 PA 175; MCL 691.1407 (4); MSA 3.996 (107) (4).**

Because Petitioners' lawsuit was filed after January 22, 1985 (the effective date of the **ROSS** decision) and Petitioners' claim accrued prior to July 1, 1986 (the effective date of **1986 PA 175**), Respondent moved in the Circuit Court of Genesee County for summary disposition, inter alia, on the ground of statutory immunity. Petitioners raised numerous arguments in opposition, including a constitutional challenge to the **HYDE** Court's decision to give limited retroactive effect to the **ROSS** reformulation of "governmental function". In dismissing Petitioners' action as against Respondent, the Trial Court rejected Petitioners' constitutionally-based argument, having found a rational basis for limited retroactive effect.

The Michigan Court of Appeals affirmed. The Court of Appeals also rejected Petitioners' argument that the rule of limited retroactivity adopted in **HYDE** makes an

irrational, arbitrary, and unreasonable distinction between tort suits filed before January 22, 1985, and those filed thereafter, despite the fact that all such claimants acquired their respective causes of action prior to the effective date of the **ROSS** decision. The Court of Appeals further rejected Petitioners' claim that they had been deprived of a property right without due process of law.

The Court found that Petitioners' equal protection argument had no merit given the Michigan Supreme Court's constitutional power to determine what law is to be applied in the courts of the State of Michigan, see e.g. **HYDE, supra, 426 MICH. 237**, a power necessarily implied from its constitutionally-recognized review and oversight functions:

> "Even if we thought that this contention had some merit, we would be extremely reluctant to hold that a rule set forth by our Supreme Court is unconstitutional given our posture as an inferior court. Presumably, the **HYDE** Court in devising a rule of retroactivity thought through the constitutional repercussions of its decision, and a conclusion of constitutional validity can therefore be fairly implied from the holding itself." See Slip Opinion, § VI, pp. 9-10, found at Supplemental Appendix, pp. 11-12.

The court found no violation of Petitioners' right to due process of law, citing the decision in **HELMER v. PEOPLE'S COMMUNITY HOSPITAL AUTHORITY, 161 MICH. APP. 675, 679-680; 411 N.W.2d 823 (1987). Id.**

On April 30, 1991, the Michigan Supreme Court denied Petitioners' application for leave to appeal. From

such denial, Petitioners filed their Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Generally, judicial decisions regarding the retroactivity or prospectivity of a new rule of law created by judicial decision are free of constitutional restraints. In evaluating non-retroactivity questions, this court has generally considered three separate factors: (1) whether the decision to be applied non-retroactively represents a "clear break" from past precedent or is an issue of first impression whose resolution was not clearly foreshadowed; (2) the history, purpose and effect of the new rule; (3) the inequity that would be imposed by retroactive application. Petitioners do not satisfy any of these factors.

ARGUMENT

The rule of limited retroactivity announced in HYDE v. UNIVERSITY OF MICHIGAN BOARD OF REGENTS, 426 MICH. 227; 393 N.W.2d 847 (1986) does not violate Petitioners' rights to due process and equal protection of the law.

It is traditional common-law theory and generally true today that overruling decisions operate retroactively. Indeed, there was no authority for the proposition that judicial decisions made law only for the future. **LINKLETTER v. WALKER, 381 U.S. 618, 622-623, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)**. Such a view was premised on

the idea that a court does not make the law but merely discovers it, that early decisions are merely evidence of the law and not the law itself, and that when a court overrules an earlier decision, it is merely discovering what is really the law. The overruled decision is treated not as if it is "bad law", but as if it never was the law. **FLEMING v. FLEMING, 264 U.S. 29, 68 L. Ed. 547, 44 S. Ct. 246 (1924); STRIKER v. PANCHER, 317 F. 2d 780 (6th Cir., 1963).**

Retroactive operation of an overruling decision is neither required nor prohibited by the Constitution. Whether and to what extent a new rule adopted in an overruling decision will be given retroactive effect is not a matter of constitutional compulsion, but a matter of judicial policy. **LINKLETTER v. WALKER, supra, 381 U.S. 627.**

In civil cases involving a non-retroactivity question, this court has generally considered three separate factors. **CHEVRON OIL CO. v. HUSON, 404 U.S. 97, 106-107, 30 L. Ed. 2d 296, 306, 92 S. Ct. 349 (1971),** cited with approval in **UNITED STATES v. JOHNSON, 457 U.S. 537, 563, 73 L. Ed. 2d 202, 222-223, 102 S. Ct. 2579 (1982).**

First, the decision to be applied non-retroactively must establish a new principal of law, either by overruling clear past precedent on which the litigants may have relied, see e.g., **HANOVER SHOE v. UNITED SHOE MACHINERY CORP., 392 U.S. 481, 496, 20 L. Ed. 2d 1231, 1243, 88 S. Ct. 2224 (1968),** or by deciding an issue

of first impression whose resolution was not clearly foreshadowed, see e.g. **ALLEN v. STATE BOARD OF ELECTIONS, 393 U.S. 544, 572, 22 L. Ed. 2d 1, 20, 89 S. Ct. 817 (169).**

Second, this court has stressed that it is necessary to weigh the merits and demerits of each case, by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation. **LINKLETTER v. WALKER, supra, 381 U.S. 627-629.**

Finally, this court has weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial and inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by upholding non-retroactivity." **CIPRIANO v. CITY OF HOUMA, 395 U.S. 701, 706, 23 L. Ed. 2d 647, 652, 89 S. Ct. 1897 (1969).**

In the civil context the "clear break" principle has usually been held to be the threshold test for determining whether a decision should be applied non-retroactively. **CHEVRON OIL CO. v. HUSON, supra, 404 U.S. 106.** Once it has been determined that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, this court has gone on to examine the history, purpose and effect of the new rule as well as the inequity that would be imposed by its retroactive application." **CHEVRON OIL CO. v. HUSON, supra, 404 U.S. 106-107. See, also, HANOVER SHOE, INC. v.**

UNITED SHOE MACHINERY CORP, supra, 392 U.S. 499.

Such a break has been recognized only when a decision explicitly overrules a past precedent of this court. **DESIST v. UNITED STATES, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969); WILLIAMS v. UNITED STATES, 401 U.S. 646, 28 L. Ed. 2d 388, 91 S. Ct. 1148 (1971).**

In addition, the administration of justice is a factor which has been considered in the question whether to give retroactive effect to an overruling decision. Retroactive effect which would cast substantial doubt upon the validity of numerous prior judgments and would impose a great burden on the administration of justice by allowing many cases to be relitigated is one of the factors favoring denial of unlimited retroactive effect to the overruling decision. **LINKLETTER v. WALKER, supra, 381 U.S. 637-638.**

It is also settled law that there is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the law or property without due process of law. **TIDAL OIL CO. v. FLANAGAN, 253 U.S. 444, 450-454, 68 L. Ed. 382, 44 S. Ct. 197 (1924); PATTERSON v. COLORADO, 205 U.S. 454, 461, 51 L. Ed. 879, 27 S. Ct. 556 (1907); BONNER v. GORMAN, 213 U.S. 86, 91, 53 L. Ed. 709, 29 S. Ct. 483 (1909); MILWAUKEE ELECTRIC RAILWAY CO. v. MILWAUKEE, 252 U.S. 100, 106, 64 L. Ed. 476, 40 S. Ct. 306 (1920); WORCESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 299, 82 L. Ed. 268, 58 S. Ct. 185 (1937); GREAT NORTHERN RAILWAY CO. v. SUNBURST OIL**

& REFINING CO., 287 U.S. 358, 364, 77 L. Ed. 360, 53 S. Ct. 145 (1932).

Based on the above-cited authority, Petitioners' Request for Writ of Certiorari must be denied. Petitioners' submission begs the question of a constitutional violation. Petitioners do not analyze or even mention the standard employed by this court when addressing a non-retroactivity issue. Indeed, Petitioners' lack of legal scholarship is stunning, if not sanctionable. Petitioners' submission fails to cite even one of this court's cases which concerns a non-retroactivity issue.

Lifting passages from lower court decisions, Petitioners attempt to fashion constitutional violations of due process and equal protection of the law without regard to this court's own pronouncements that the issues of retroactivity and prospectivity do not generally implicate constitutional violations. **LINKLETTER v. WALKER, supra, 381 U.S. 627; TIDAL OIL CO. v. FLANAGAN, supra; PATTERSON v. COLORADO, supra; BONNER v. GORMAN, supra; MILWAUKEE ELECTRIC RAILWAY CO. v. MILWAUKEE, supra; WORCESTER COUNTY TRUST CO. v. RILEY, supra; GREAT NORTHERN RAILWAY CO. v. SUNBURST OIL & REFINING CO., supra.**

Moreover, Petitioners cannot argue, and do not argue, that they are left remediless if their petition is denied. The action against Dr. Dias and his professional corporation is stayed in the trial court awaiting the outcome of these appellate proceedings.

Petitioners do not meet the threshold for non-retroactivity analysis; i.e., Petitioners cannot show that the decision in **ROSS v. CONSUMERS POWER CO. (On Reh.),**

420 MICH. 567; 363 N.W.2d 641 (1984) represents a "clear break" with the rule of law announced in **PARKER v. HIGHLAND PARK, 404 MICH. 183; 273 N.W.2d 413 (1978).**

The **ROSS** Court did not explicitly overrule the decision in **PARKER**. It only impliedly overruled the decision in **PARKER. HYDE, supra, 426 MICH. 231, 243.**

The **ROSS** Court did not overrule *clear precedent*. The court acknowledged the confused state of the law in Michigan over statutory immunity:

> " . . . We recognize that our case law on these questions is confused, often irreconcilable, and of little guidance to the bench and bar . . .
>
> * * *
>
> " . . . We note that the Legislature was certainly aware of our conflicting 'morass' of case law concerning the definition of 'governmental function' when it enacted §7 . . . " **420 MICH. 596, 610.**

Moreover, in context, the decision in **PARKER** was one of numerous unsuccessful efforts by the Michigan Supreme Court and the Michigan Court of Appeals to distill a cohesive, uniform, and workable set of rules defining the injured party's rights and the governmental agency's liability in the area of statutory immunity. **ROSS, supra, 420 MICH. 596-621; HYDE, supra, 426 MICH. 240-241.** Ironically, **PARKER** itself overruled prior precedent to the effect that the Supreme Court would be bound by the common-law definition of "governmental function". **ROSS, supra, 420 MICH. 609-610.**

The **HYDE** Court noted that a decision has been accorded limited retroactive effect when prior case law has been overruled or when a statute has been reconstrued, but that complete prospective effect has been given to decisions only when clear and uncontradicted case law has been overruled. 426 MICH. 240, citing **TEBO v. HAVLIK, 418 MICH. 350; 343 N.W.2d 181 (1984). See, also, GUSLER v. FAIRVIEW TUBULAR PRODUCTS, 412 MICH. 270; 315 N.W.2d 388 (1981).**

As the above cited passages make clear, the **HYDE** Court announced a rule of limited retroactivity, **426 MICH. 230-231, 246,** after weighing the merits and demerits of the alternatives, by looking to the prior history of the rule in question, its purpose and effect, and by weighing the inequity imposed by full retroactive application of the decision. As a result, there is no support in fact or in law for Petitioners' contention that the Michigan Supreme Court acted arbitrarily, unreasonably, and irrationally when it determined, as a matter of judicial policy, to give limited retroactive effect to the definition of "governmental function" which it announced in **ROSS**.

Petitioners appear to argue that their constitutional rights to due process and equal protection of the law have been violated by the failure of the Michigan Supreme Court to give wholly prospective effect to the **ROSS** decision; i.e., by the failure of the Michigan Supreme Court to hold that the definition which it announced be applied only to conduct occurring *after* the effective date of the decision. Petitioners do not dispute the **HYDE** Court's premise that the definition of "governmental function" was anything but clear and uncontradicted or that the consolidation of "nine factually diverse cases"

should have been a signal to bench and bar that the definition was being reevaluated. **426 MICH. 240-241.** In support of their position, Petitioners cite only ex post facto case law. Such authority is readily distinguishable. Petitioners also claim reliance amounting to a vested right in **PARKER'S** definition of "governmental function." It is settled law that a change of decision does not deprive a litigant of equal protection or due process of law.

Moreover, Petitioners' argument loses sight of the constitutionally-recognized power of the Michigan Supreme Court to determine what law will be applied in the courts of the State of Michigan. It is undisputed that there were literally hundreds of governmental immunity cases "waiting in the wings" for the decision in **ROSS**. They represented the best efforts of the various panels of the Court of Appeals to divine the meaning of "governmental function". Pure prospective application of the decision in **ROSS** would have overburdened the administration of justice in Michigan. It would not have resolved this logjam of cases awaiting appellate resolution. If the decision in the consolidated cases comprising **ROSS** represents the essence of the Michigan Supreme Court's constitutionally-empowered review function, the decision in **HYDE** that **ROSS'** definition of "governmental function" be given limited retroactive effect represents the essence of the Michigan Supreme Court's constitutionally-empowered oversight function.

In addition, Petitioners concede that the rational basis standard of review is the appropriate standard for this case. Using such a standard, Petitioners' unconstitutionality arguments must fail. Even if Petitioners can

show that application of **HYDE** discriminates against them in some way, such discrimination does not rise to the level of either a due process or an equal protection violation. The Michigan Supreme Court could have intended the limited retroactivity announced in **HYDE** to achieve uniformity in the law applied by the courts of the State of Michigan from and after January 22, 1985, the effective date of the **ROSS** decision. Similarly, the Michigan Supreme Court could have intended limited retroactivity in an effort to limit prejudice to the thousands of litigants whose cases were pending in which a governmental immunity issue had been raised and preserved as well as to all cases filed after January 22, 1985.

Petitioners fail to satisfy the requirements of this court to take up a non-retroactivity issue in this case. The **ROSS** decision did not explicitly overrule **PARKER**. Indeed, the opposite is true; **ROSS** only impliedly overruled **PARKER**. Prior precedent was anything but clear. The issue was not one of first impression. Weighing the merits and demerits of each case, looking to prior history of the rule in question, its purpose and effect, and whether retrospective application would further or retard its operation, it is clear that the decision to give **ROSS** limited retroactive effect was not arbitrary, irrational or unreasonable. The administration of justice would have been greatly overburdened by either wholly retroactive or fully prospective operation of the **ROSS** decision. As to the former, all of the cases decided on authority of **PARKER** would be open for reconsideration. As to the latter, the large number of cases which had been held in

abeyance awaiting the Michigan Supreme Court's treatment of "governmental function" would remain unresolved and without authoritative guidance for resolution.

CONCLUSION

Respondents respectfully request that this court deny Petitioners' Petition.

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